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In the

# Supreme Court of the United States

October Term, 1942

43

UTAH COPPER COMPANY,
BINGHAM AND GARFIELD RAILWAY COMPANY, and
KENNECOTT COPPER CORPORATION,

*Petitioners,*

vs.

RAILROAD RETIREMENT BOARD,
RAILWAY LABOR EXECUTIVES ASSOCIATION, and
BROTHERHOOD OF RAILROAD TRAINMEN,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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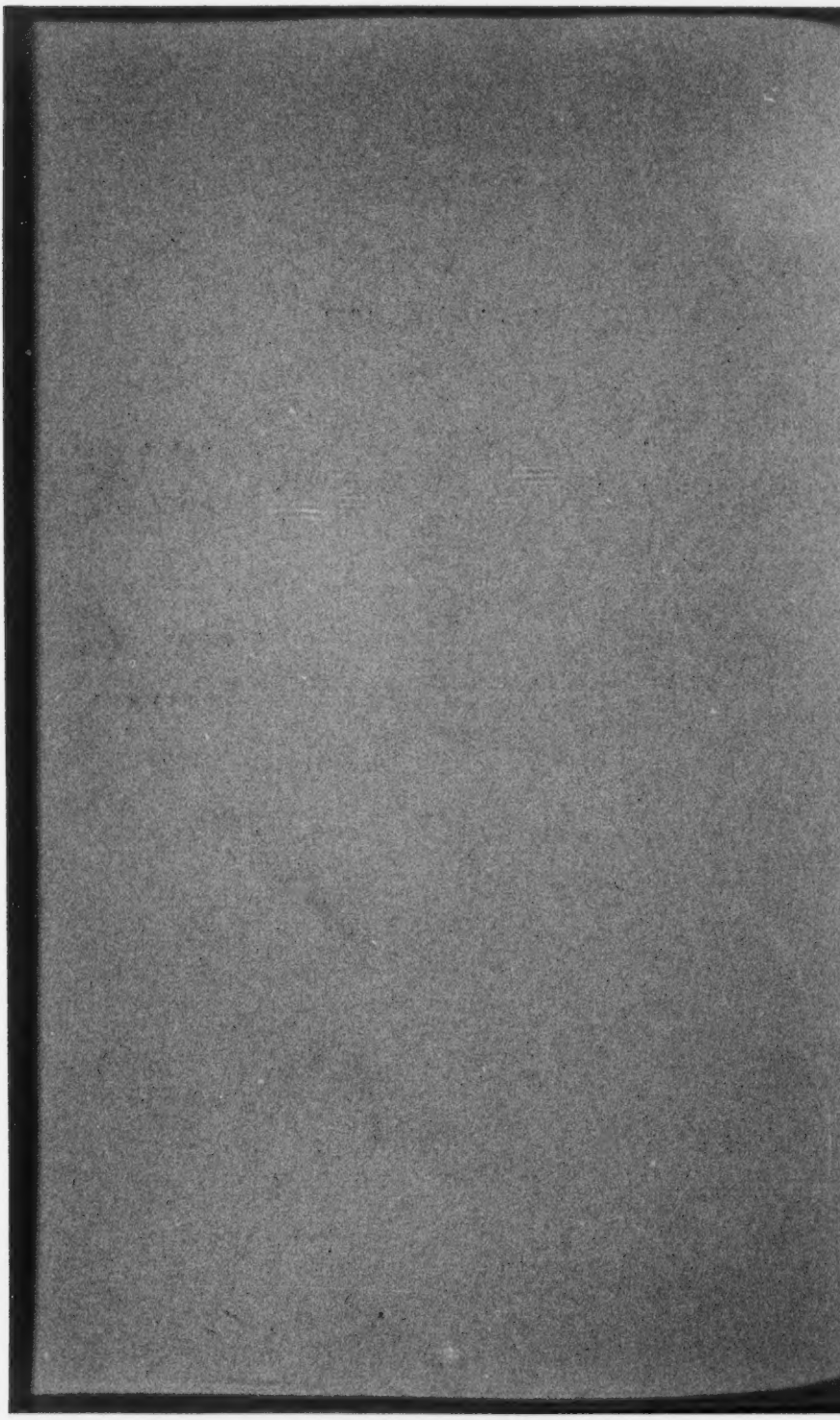

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UTAH COPPER COMPANY,
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*Respondents.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners pray that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Tenth Circuit, entered July 27, 1942, rehearing denied August 11, 1942.

## OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Tenth Circuit, (R. 693) is reported in 129 Fed. (2d) 358. The opinion of the District Court of the United States for the District of Colorado (R. 108) is reported in 41 Fed .Supp. 763.

## JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 27, 1942 (R. 702). A petition for rehearing was denied August 11, 1942 (R. 715). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

## QUESTIONS PRESENTED

1. Certain workers are hired and paid by a copper mining company to haul its ore in its ore trains from the mine to its mills for processing. The ore is transported over railroad tracks owned by a carrier under a trackage license granted in 1920. To comply with regulatory statutes and rules enacted by national and state authorities, and in the interest of practical efficiency, economy and coordination, the workers engaged in the ore haulage have been subjected to the carrier's general supervision and direction. But the ultimate power to hire and discharge these ore-haul workers rests with the mining company.

Are the ore-haul workers employees in the service of the carrier for compensation within the meaning of the Railroad Retirement Act?

2. The rolling stock and equipment used by the mining company in the haulage of its ore from the mine to its mills are owned by that company and are repaired and maintained

by certain shop workers in shops owned and operated by the mining company. In addition, and to a very minor extent, the workers also make repairs to the carrier's equipment and to that of other transportation companies whenever a request for such repairs is made by the carrier to the mining company. The stock of the carrier is owned by the mining company.

Is the mining company an employer within the meaning of the Railroad Retirement Act with respect to the workers engaged in the repair and maintenance of the mining company's equipment used in hauling the ore from the mine to the mills? Is the service performed by these workers while engaged in the maintenance and repair of the mining company's equipment "in connection with the transportation of passengers or property by railroad" within the meaning of the Act?

## STATUTE INVOLVED

The pertinent provisions of the Railroad Retirement Act of 1937, as amended, 50 Stat. 307, 54 Stat. 264, 785, 786, 1100, 45 U.S.C. Sec. 228-a, are as follows:

> "(a) The term 'employer' means any carrier (as defined in subsection (m) of this section), and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when

in the possession of the property or operating all or any part of the business of any such employer . . . ."

* * * *

"(b) The term 'employee' means (1) any individual in the service of one or more employers for compensation, (2) any individual who is in the employment relation to one or more employers, and (3) an employee representative. The term 'employee' shall include an employee of a local lodge or division defined as an employer in subsection (a) only if he was in the service of or in the employment relation to a carrier on or after the enactment date."

* * * *

"(c) An individual is in the service of an employer whether his service is rendered within or without the United States if he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, which service he renders for compensation: . . . ."

* * * *

"(h) The term 'compensation' means any form of money remuneration earned by an individual for services rendered as an employee to one or more employers, or as an employee representative, including remuneration paid for time lost as an employee, but remuneration paid for time lost shall be deemed earned in the month in which such time is lost."

* * * *

"(l) The term 'employee' includes an officer of an employer.

"(m) The term 'carrier' means an express company, sleeping-car company, or carrier by railroad, subject to Chapter 1 of Title 49."

## STATEMENT

The petitioner, Kennecott Copper Corporation, owns a large open pit copper mine in Bingham Canyon, Salt Lake

County, Utah, concentration mills at Magna and Arthur, Utah, about twenty miles away from the mine (R. 212), and several fully equipped repair shops (R. 234, 263, 270). These properties are operated by the petitioner, Utah Copper Company, which is a managerial and operating agent, and a wholly owned subsidiary of Kennecott Copper Corporation (R. 213). The petitioner, Utah Copper Company, the agent, and Kennecott Copper Corporation, the principal, and the latter's predecessors in interest in the title to the mining property, are hereinafter referred to indiscriminately as the "Mining Company". The petitioner, Bingham and Garfield Railway, hereinafter called the "Carrier", is a common carrier organized under the laws of Utah (R. 209). It owns and operates the railroad which connects the mine and the concentration mill. This line of railroad is 20.23 miles in length, extending along the slopes of the Oquirrh Mountains from the mine to the mills, a distance of approximately 17 miles, and thence approximately 3 miles to the smelter of the American Smelting & Refining Company, all in the West Mountain Mining District, in Salt Lake County, in the State of Utah (R. 210). The stock of the Carrier is entirely owned by Kennecott Copper Corporation (R. 213).

Since September 1, 1920, the ore has been mined from the surface in the copper mine by large shovels of the Mining Company and has been loaded into the Mining Company's railroad cars on the various levels of the mine. The loaded cars have been hauled to the assembly yards of the Carrier by locomotives of the Mining Company manned by crews of the Mining Company. These loaded cars have been made up into large trains by the switching crews of the Carrier. For this switching service, the Carrier has billed the Mining

Company on an hourly basis. The trains so made up are then delivered by the Carrier to the Mining Company and by the latter moved to its concentration mills (R. 241) under a trackage license to be discussed below. At the concentration mills the ores are reduced to concentrates. These are loaded on railroad cars and hauled for smelting to the American Smelting & Refining Company, which is independent of the petitioners. This last movement is under the Carrier's published tariffs and on local bills of lading, with the Mining Company as the shipper and the Smelting Company as the consignee (R. 242).

Prior to September 1, 1920, the Mining Company delivered the ore to the Carrier, which transported it under regular published tariff schedules. The great majority of the Carrier's business consisted of this transportation. In fact the Carrier was organized chiefly for this purpose, and its entire stock always has been owned by the Mining Company (R. 218, 219). The Carrier has satisfied the common carrier transportation needs of the community in which it operates (R. 210, 211), but the average annual proportion of the Mining Company's car mileage over the tracks of the Carrier pursuant to the trackage license, to the total car mileage of both Mining Company and Carrier over those tracks for the twelve years of 1926 to 1937, both inclusive, varied between 83.33 percent and 94.88 percent, corresponding directly to the scale of the Mining Company's operations (R. 238). And this car mileage of the Carrier includes the freight handled by the Carrier destined to the Mining Company, the latter constituting by far the larger percentage of the freight hauled by the Carrier (R. 239).

On May 28, 1920, the Carrier and Mining Company made and entered into a trackage license agreement which became effective September 1, 1920, was assigned to Kennecott in the course of the latter's succession to the title to the mining property, and has been at all times since September 1, 1920, in full force and effect (Ex. 17, R. 491, 230). Under the agreement the Mining Company was granted the right to transport the ore over the lines of the railway. This right, however, was to be exercised in common with the Carrier and with others to whom a similar license might be granted.

The agreement provided that the Mining Company had the right to transport ores from the mine over the tracks and line of the Carrier in its own cars and with its own equipment; that it had the right to select and should select and employ all engine and train crews to man and operate the trains and equipment. Moreover, it further provided that all engine and train crews operating the engines, cars and equipment of the Mining Company should be the sole employees of that Company and should be compensated solely by it. All rights granted the Mining Company were subordinate to the rights and duties of the Carrier as a common carrier. The latter was made the sole judge as to whether the operations of the Mining Company over its tracks were in derogation of its duty as a common carrier (R. 493-495). The employees of the Carrier who operated the transportation equipment that was sold to the Mining Company were transferred from the payroll of the Carrier to that of the Mining Company and were thereafter paid by the latter (R. 246, 270, 684, 686).

To avoid violation of the regulatory acts and rules imposed by National and State authority*, and in the interest of practical efficiency, economy and coordination, the employees engaged in ore haulage have been governed by the same disciplinary authority as that which governs the Carrier's operation of its trains, engines and cars. For those reasons the agreement provided that the Mining Company's operation over the Carrier's tracks should be subject to the general supervision and direction of the Carrier (R. 246-248). But although the Carrier has been authorized by the Mining Com-

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*Under the Accident Report Acts of May 6, 1910, U.S.C. Title 45, Section 38, the carrier is required to make to the Interstate Commerce Commission full and complete reports of all accidents and to submit to investigations thereof by the Interstate Commerce Commission. By the Ash Pan Act of May 30, 1908, U.S.C. Title 45, Section 17, it is made unlawful to use on the common carrier tracks any locomotive not equipped with an ash pan that can be dumped or emptied and cleaned otherwise than by employees going under such locomotive. By the Boiler Inspection Act of February 17, 1911, as amended June 7, 1934, U.S.C. Title 45, Section 22, the carrier is required to equip its locomotives with safe and suitable boilers and appurtenances and the carrier is denied the right to permit to be used on its lines any locomotive unless the same, its boiler, tender and all parts and appurtenances thereof, are in proper condition for safe operation; and it is further required by that Act that such locomotives, boilers, tenders, parts and appurtenances must be inspected from time to time and be able to withstand the tests prescribed by the rules and regulations of the Interstate Commerce Commission. By the Hours of Service Act of March 4, 1907, as amended, U.S.C. Title 45, Section 61, it is made unlawful to permit any men to be or remain on duty on the Railway Company's common carrier tracks for a longer period than 16 consecutive hours, etc. By the Safety Appliance Act of March 2, 1893, as amended, U.S.C. Title 45, Section 1, it is required that all cars operated over common carrier tracks must be equipped with automatic couplers and continuous brakes and with other appurtenances deemed necessary to the safe handling

pany so to supervise its employees while hauling ore over the Carrier's tracks, the ultimate power to hire and discharge the ore haul employees reposes in the Mining Company, and those employees are engaged in its work. Pursuant to the provisions of the agreement the Mining Company has at all times after Sepember 1, 1920, hauled the ores from mine to concentrating mills and has returned to the mine the empty cars used in that haulage (R. 231-244). So much for the ore haul workers.

The shop workers, the second group of employees involved

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of cars and locomotives. By Title 49, U.S.C. Section 26, as amended, it is provided that each carrier shall install upon its railroad such safety devices as the Interstate Commerce Commission shall order to promote the safety of railroad operation, and each carrier is required to formulate and file with the Commission its rules, standards and instructions for the installation, inspection, maintenance and repair of such safety devices, the same when approved by the Commission to become obligatory upon the carrier. And each carrier is required to report to the Commission, failure of such safety devices upon its line of railroad.

By Title 76, Ch. 4, Section 1, Revised Statutes of Utah, 1933, the Public Service Commission of Utah is vested with power to supervise and regulate every carrier in the State of Utah and the manner of its operation. By Title 76, Ch. 4, Sections 7 and 14, Revised Statutes of Utah 1933, the Public Service Commission of Utah is empowered to prescribe safe and adequate rules, regulations, practices, equipment, appliances and facilities and to require every carrier to construct, maintain and operate its line of railroad in such manner as to promote the health and safety of its employees and the public. By Title 76, Ch. 4, Section 16, Revised Statutes of Utah 1933, each carrier is required to file with the Public Service Commission of Utah a report of each accident occurring upon its railroad, and the Commission is empowered to make such order or recommendation with respect thereto as in its judgment shall be reasonable under the circumstances.

in this proceeding, are employed in the car repair shop, engine house and back shop at the mill at Magna, which shops are used exclusively for repair work on rolling stock. At the mine are maintained a machine shop, boiler and blacksmith shop, electrical shop, carpenter shop, shovel repair shop and car repair shop, and in these shops all repair work is performed on the Mining Company's mine equipment, consisting principally of electric shovels, drill equipment, dump cars, mine locomotives, etc. Likewise, at each of the mills, in addition to the car repair shop, engine house and back shop at Magna hereinbefore referred to, there are a machine shop, boiler and blacksmith shop, electrical shop and carpenter shop. In the latter shops is performed repair work on milling machinery and equipment, and all heavy machine work required on the railway equipment of the Mining Company and of the Carrier (R. 263, 264). Admittedly, and the lower Court so held, the employees engaged in all of these shops are employees of the Mining Company and have no connection with the Carrier (R. 700).

The trackage license has continued in effect with the knowledge, consent and approval of both the Interstate Commerce Commission and the Public Service Commission of the State of Utah and the latter's predecessor, Public Utilities Commission of that State, as an agreement whereby the ore transportation and the incidents thereof were made in fact as well as appearance the private, industrial interplant haul of the Mining Company, divorced from any carrier aspect (R. 210, 234).

The Mining Company and its employees are subject to the employment taxes provided by Chapter 9, sub-chapters A and C of the Internal Revenue Code (26 U.S.C. Section

1400 et. seq.), and its predecessor Social Security Act (42 U.S.C. Section 301, et seq., 49 Stat. 620), and by the Employment Security Act of the State of Utah (c. 40, Laws of Utah 1941), and its predecessor Unemployment Compensation Law (c. 1, Laws of Utah 1936, Special Session, as amended by c. 43, Laws of Utah 1937, and by c. 52, Laws of Utah 1939); and all such taxes have been paid with relation to the Mining Company's employees, including the workers engaged in its ore haulage (R. 246-247).

On June 20 and 21, 1939, a joint hearing was held at Ely, Nevada, before an examiner of the respondent and an examiner of the Interstate Commerce Commission, this with relation to workers engaged in the ore haul conducted by Nevada Consolidated Copper Corporation over the tracks of the Nevada Northern Railway Company between Ruth and McGill, Nevada. The respondent's examiner was authorized to determine whether the employees were subject to the Railroad Retirement Act and the examiner of the Interstate Commerce Commission was empowered to determine whether they came within the definition of "employee" in the Railway Labor Act, as amended, 44 Stat. 577, 45 U.S.C., Section 151.*

*This hearing involved the petitioners in the companion case, Nevada Consolidated Copper Corporation, Nevada Northern Railway Company and Kennecott Copper Corporation v. Railroad Retirement Board, et al, in which a petition for certiorari will be filed contemporaneously with this petition. The examiner for the I.C.C. held that the ore haulage workers were not employees of the carrier, but were employees of the mining company. Exceptions to the examiner's report were taken in the Nevada case by the Brotherhood of Locomotive Engineers and Brotherhood of Trainmen. Division 3 of the I.C.C., Commissioner Patterson dissenting, dismissed the Brotherhood's exceptions on the ground that the Commission has no jurisdiction to deter-

(This note concluded on bottom page 12)

The Railroad Retirement Board, in the case at bar, concluded that the Mining Company at all times had been engaged in a commercial mining business, that it has not operated as a carrier by railroad subject to Part I of the Interstate Commerce Act (R. 52), but that "individuals who have been engaged since May 28, 1920, in the performance of service in connection with the transportation of ore or the movement of trains or cars over the tracks of the Bingham and Garfield Railway Company between Bingham and Arthur and Magna, Utah, including individuals engaged in switching operations connected with the unloading of cars of ore at the Mining Company's mills at Magna and Arthur, for which service they have been compensated directly by the Mining Company, have been in the service of the Bingham and Garfield Railway Company with respect to such service within the meaning of the Railroad Retirement Acts of 1935 and 1937", and that in the repair by the Mining Company of its own equipment in its own shops at Magna, equipment that was used by it in its ore haulage from mine to mills solely, the Mining Company was "an 'employer' under the Railroad Retirement Act of 1937 and a 'carrier' under the Railroad Retirement Act of 1935 with respect to and to the extent only of, their operation

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mine whether the workers are in the employment of Nevada Northern Railway Company or Nevada Consolidated Copper Corporation. 246 I.C.C. 757. The brotherhoods filed a petition for rehearing and reargument before the entire Commission, and the Commission has set the case for reargument on October 19, 1942. The definitions of "employee" in the Railroad Retirement Act and the Railway Labor Act are substantially identical. If the Commission persists in its well-settled policy of refusing to determine whether certain employees are within the Railway Labor Act, 245 I.C.C. 415, 246 I.C.C. 703, or if it confirms the report of its examiner, there will exist a conflict with respect to the status of these employees.

of the railroad shops at Magna, Utah." (R. 53, Conclusion of Law 6).

On November 26, 1940, the petitioners filed in the United States District Court for the District of Colorado their complaint (R. 8) against respondent, the Railroad Retirement Board, to compel the Board to set aside its decision on the ground that it violated the petitioners' legal rights. The District Court dismissed the action (R. 113). The Circuit Court of Appeals for the Tenth Circuit affirmed the judgment of dismissal. It decided that the District Court had erred in holding that the decision of the Board on the question of its jurisdiction over these employees was final because supported by competent evidence. But after an independent examination of the record, the Court held that the ore haul workers were employees within the Railroad Retirement Act on the ground that they were under the supervision and control of the Carrier and thus under the continuing authority of an employer within the meaning of Subsection (c) and that the shop workers were also within the Railroad Retirement Act on the ground that as to them the Mining Company was an employer within the definition of Subsection (a) (R. 693, 702).

## REASONS FOR GRANTING THE WRIT

1. The Circuit Court of Appeals for the Tenth Circuit has decided important questions of Federal law* which have not been, but should be, settled by this Court. This case and

*We do not question the lower court's holding upon the scope of judicial review of the respondent's orders. We merely mention it to show that the decision below involves questions concerning the administration of an important Federal Statute, which are of great concern to employers and to the Railroad Retirement Board as well.

the companion Nevada case are the first to raise significant issues of statutory construction under the Railroad Retirement Act. The meaning and application of the terms "employer" and "employee," as defined in Section 1 of the Act, not only delimit the area of its impact upon the American economy, but also determine the jurisdiction of the Railroad Retirement Board and Social Security Board. These are serious questions for many employees and employers, including the petitioners. Carriers must of necessity supervise the operations of others over their tracks. The Interstate Commerce Commission must approve licenses, and trackage licenses uniformly provide for such supervision.*

Moreover, the petitioners are engaged in a desperate effort to meet the mounting demands of the war production program. The decision of the lower court upsets relationships of more than twenty years' standing which, as will be shown below, have been repeatedly sanctioned by Federal and State authority. Important executives will be compelled to divert their attention from the difficult tasks of production to study of the effect of the decision upon the petitioners, particularly in the light of many Federal and State regulatory statutes, and to consideration of the adjustments or even pos-

*The Bureau of Finance, Interstate Commerce Commission, has jurisdiction over trackage licenses. We have been informed by the Bureau that no trackage license has been seen in which the lessor does not exercise control or supervision. (See also footnote, p. 21, infra.) The duty to effectively supervise the operation of others over the Carrier's tracks is imposed upon the Carrier as the result of the Acts of Congress and the Statutes of the State of Utah, to which reference is supplied by the footnote at page 8, and by the further practical necessity of protecting the Carrier's ability to perform its own obligation to the public.

sible reorganization which the decision may render necessary. For instance, are the ore haul workers employees of the Carrier under the Railroad Retirement Act but employees of the Mining Company for all other purposes? Are they employees of the Carrier under any other Act? Are they employees of the Mining Company for any purpose? Is the Mining Company an employer under the Railroad Retirement Act for any other employees who may do work in any way related to the repair shops? Will it make any difference if the shop workers repair only the Mining Company's equipment? What of the National Labor Relations Act (29 U.S.C. Section 151-63); Railway Labor Act, as amended (45 U.S.C. Section 151); Fair Labor Standards Act (29 U.S.C. Section 201, et seq.); Federal Employers' Liability Act (45 U.S.C. Section 51, et seq.)? What of the recent order of the War Manpower Commission, 7 Fed. Reg. 7131, stabilizing employment in non-ferrous metals activities in Utah? It seems incredible that because the Carrier has immediate supervision over the ore haul workers, it is their employer under the Railroad Retirement Act. They are also under the mediate supervision of the Mining Company. It has the final say in hiring and discharging them; it pays their compensation. Finally, these men do the work of the Mining Company — they render "service" to that Company, not to the Carrier. Clearly, under the statute they are employees of the Mining Company. If the ore haul workers are employees of the Mining Company engaged in industrial interplant haulage, the shop workers repairing equipment used exclusively in that haulage are not, as the lower court held, "engaged in work connected with transportation of passengers and property *by a railroad.*" (R. 700, italics supplied). Hence, they are not employees within the Railroad Retirement

Act, and the Mining Company is not an employer within that Act.

2. The Circuit Court of Appeals for the Tenth Circuit has decided a Federal question in a way in conflict with the decisions of this Court. It has held that the ore haul workers are employees of the Carrier because subject to its supervision. This, despite the recognition by both the Mining Company and the workers that the Mining Company is their employer (Ex. 19, R. 250, 521; Ex. 53, R. 440, 635), the hauling of ore by workers for the Mining Company (*i.e.*, the service is clearly that of the company), the payment of the workers' compensation by the Mining Company and the fact that the Mining Company ultimately has the power to hire and retain or discharge (R. 260). The decision of the lower court magnifies one phrase of subsection (c) and ignores completely the remainder of that subsection. Under it, to be in the service of an employer, an individual must not only be subject to his supervision, but must be subject to supervision of "his service" by the employer, "which service" he renders to the employer "for compensation" from the employer. These additional factors are basic, not only in the Railroad Retirement Act but in other Federal statutes.

The Federal Employers' Liability Act, 45 U.S.C. Section 51, provides that interstate railroads shall be liable "to any person suffering injury while he is employed by such carrier in such commerce" by reason of its negligence or defective equipment. This Court has held that an individual is not employed by a carrier simply because he may be subject to its supervision. Thus, in *Hull* v. *Philadelphia & Reading Ry. Co.*, 252 U. S. 475 (1920), an individual hired by one railroad was killed while on the property of the defendant's

railroad tracks. Under an agreement for through traffic between the two railroads it was provided that train crews should be subject to the rules, regulations, discipline and orders of the railroad which owned the line on which they were operating. This Court held that the deceased did not become an employee of the defendant simply because he was subject to its supervision. He remained the employee of the railroad which hired him because what he did upon the line of the defendant was done as part of his duty to the other railroad which first employed him. In *Robinson* v. *Baltimore & Ohio Ry. Co.*, 237 U. S. 84 (1915), the plaintiff, a Pullman porter on defendant's train, was subject to the rules and regulations of the defendant. This Court held that he was not for that reason alone an employee of the defenddant. See also *Standard Oil Company* v. *Anderson,* 212 U. S. 215 (1909); *Linstead* v. *Chesapeake & Ohio Ry. Co.,* 276 U. S. 28 (1928). For conflict with decisions of other Circuit Courts of Appeal in similar situations, *Docheney* v. *Pennsylvania Ry. Co.,* 60 Fed. (2d) 808 (C.C.A. 3, 1932), cert.den., 287 U. S. 665 (1932); *Bowman* v. *Pace,* 119 Fed. (2d) 858 (C.C.A. 5, 1941).

3. There is a contradiction between the decision of the Court below and the decisions of the Interstate Commerce Commission whereby have been construed the like provisions of the Railway Labor Act. The definitions of "employer" and "employee" under the Railway Labor Act and the Railroad Retirement Act are the same (45 U.S.C. Section 151, First and Fifth). In fact, the Interstate Commerce Commission participated in the joint hearings in the Nevada companion proceeding under the provisions of the Railway Labor Act.

The Board and the Court below concluded that the ore haul workers were subject to the continuing authority of the Carrier to supervise and direct the manner of rendering their service, and that, hence — quite regardless of fact — that these workers are "in the service of" the Carrier, and, hence that the Carrier is the "employer". We respectfully submit that is not what the Act provides; the Act does not attempt to define as an employment relationship one that in fact does not exist. It does not follow that merely because the Carrier may exercise over a worker the continuing authority described, the worker is in the Carrier's service. The ore haulage here involved is not in fact a Carrier service and the compensation for the service is not paid by the Carrier. The workers therein engaged, therefore, cannot be in the service of the Carrier.

The examiner for the Interstate Commerce Commission in the companion Nevada proceeding held that under the substantially identical provisions of the Railway Labor Act the ore haul workers are not employees of the Carrier. He said:

> "The statute here under consideration is the Railway Labor Act. In order to be a railway employee within the meaning of that Act, a worker must be in the service of a carrier. The ore-line workers are not in the service of the Nevada Northern, because the work they do is the work of the copper company. The Nevada Northern does not transport the ore tonnage, and is without authority to do so. Hence, the ore-line service cannot accurately be termed the work of a railroad employee". (Nevada Case, Appendix, p. XX).

And again,

> "The provisions of the Railway Labor Act are of a positive and definite character. The line of de-

marcation between individuals who are railway employees, and those who are not railway employees, is quite sharp and clear.

"To be a railway employee within the meaning of the Railway Labor Act, the worker must be in the service of a carrier. A rail carrier is defined by the Railway Labor Act as a railroad which is subject to the Interstate Commerce Act. The Nevada Northern Railway is a carrier of that type, but the copper company is not. * * * (Nevada Case, Appendix, p. XXVI).

"Inasmuch as the copper company is not a carrier, within the meaning of the Railway Labor Act, the only way the ore-line workers can legally be classified as railway employees is to find that they are in the service of the Nevada Northern. * * * To hold that the ore-line workers are in the service of the Nevada Northern, it must be found that the movement of the ore trains is railroad transportation service which is performed by that carrier. And it cannot accurately be said, as a matter of fact or as a matter of law, that the ore tonnage is moved by the Nevada Northern. At no time does this carrier have actual possession, or legal possession or custody of the ore tonnage. At no time does it transport, or have authority to transport that tonnage. It follows that the ore-line workers are not in the service of, and are not employees of, the Nevada Northern." (Nevada Case, Appendix, p. XXVII).

And again,

"Counsel for the participating parties entertain different views concerning the meaning of Section 1, paragraph 5, of the Railway Labor Act. * * * That statute provides three tests by which to identify the workers who are subject to its provisions. First, the individual must be in the service of a carrier. Second, the carrier must have continuing authority to supervise the service which the individual renders. Third, the work which the individual performs must be defined by this Commission as the work of a railroad employee or subordinate official. To be an employee within the meaning of the Railway Labor Act, an in-

> dividual must pass all three tests. The ore-line workers involved in the instant proceeding are not even employees under the first test, because they are not in the service of a carrier as that term is defined by the Railway Labor Act. Nor are they railway employees within the meaning of the 1938 Fair Labor Standards Act". (Nevada Case, Appendix, p. XXIX).

Such is the construction by the Interstate Commerce Commission of the Railway Labor Act, in Ex Parte No. 72 (Sub. No. 1). In the Matter of Regulations Concerning the Class of Employees and Subordinate Officials to be Included within the Term "Employees" under the Railway Labor Act, Elevator Starters and Operators, and Information Clerks, Hudson & Manhattan Railroad Company, decided May 6, 1941, 245 I.C.C. Rep. 415. The Commission's interpretation of the words "in the service of", essential to the Railway Labor Act's definition of the term "employee", is the same as that of Examiner Rice in the Nevada proceeding. To the same effect is Interstate Commerce Commission's Ex Parte No. 72 (Sub. No. 1), In the Matter of Regulations Concerning the Class of Employees and Subordinate Officials to be Included within the Term "Employee" under the Railway Labor Act, Ore Dock Foremen and Laborers, Decided October 6, 1941, 246 I.C.C. Rep. 703, at 708.

The Board and the Court below lose sight of the fact that ore tonnage transportation is not a carrier service, and hence the carrier has no employees in that service. The workers engaged in the ore transportation cannot be within the provisions of the Railroad Retirement Acts.

There is further conflict between the decision below and the decisions of the Interstate Commerce Commission and of the Utah Public Utilities Commission. The Circuit Court

of Appeals for the Tenth Circuit casts doubts upon the trackage agreement. But the trackage license agreement (Ex. 17, R. 491-503) has continued in existence over the period of twenty-two years, with the knowledge and approval of the Interstate Commerce Commission and the State Commission, and has been construed by the Interstate Commerce Commission and the State Commission to have established and perpetuated a purely private industrial interplant haulage of ore by the Mining Company from Mining Company's mine to Mining Company's reduction works, that neither was, nor is, in any manner related to, or a part of any function or operation of a carrier.* The Interstate Commerce Commission on its own motion conducted an investigation into its legality and the Public Utilities Commission of the State of Utah did the same thing. A hearing was held at Salt Lake City, Utah, December 14, 15, and 16, 1921, both Commissions sitting. The investigation of the Interstate Commerce Commission was discontinued October 3, 1922, 73 I.C.C. 768. The proceeding before the Public Utilities Commission of Utah was disposed of by its report of January 26, 1923 (Ex. 40, R. 569). It found that

> "The method of operating under the agreement now under investigation in this case is as follows:
>
> "The haul between the mine at Bingham and the mills at Magna and Arthur, is performed by the Copper Company for itself, in its own cars, with its own motive power and equipment and in trains manned by its own employees and crews. During the entire

*Trackage agreements similar to that here involved were made contemporaneously between Nevada Northern Railway Company and Nevada Consolidated Copper Company, and Ray & Gila Valley Railroad Company and Ray Consolidated Copper Company, 138 I.C.C. 40, 45, 59.

movement from the mine to the mills the ore is in the possession of the Copper Company itself."

Shortly after the conclusion of its investigation of the trackage agreement, the Interstate Commerce Commission conducted hearings with relation to certain settlements claimed under Section 209 of the Transportation Act of 1920 by Nevada Northern Railway Company, Bingham and Garfield Railway Company and Ray & Gila Valley Railroad Company. 138 I.C.C. 40, 45, 59. The Commission held that even during the period before September 1, 1920, when the railway companies hauled the ores under published tariffs as within their common carrier operation, the mine and the mills were portions of one industrial plant. Thus, the Interstate Commerce Commission not only approved its order of dismissal in 73 I.C.C. 768, but applied the same conclusion to the period prior to September 1, 1920, when the carriers hauled the mining companies' ores under their published tariffs, by the carriers' equipment, manned by the carriers' employees:

"* * * It is apparent that the primary purpose of the carrier's line is, and since its construction has been, to serve the needs of the industry. The record shows that the ore transported by this carrier was similar to the ore transported by the Bingham & Garfield Railway Company, as described in the report upon the claim of that carrier, 138 I.C.C. 45, issued contemporaneously with this report. The reduction of the ore necessitated its removal from the mine to a point where a large volume of water was available as well as large space for the deposit of waste. In practical effect, the mine and the mill are portions of one industrial plant. * * *

"Under date of May 28, 1920, the carrier and the copper company entered into an agreement to become operative September 1, whereby the copper company

took over the transportation of its ore from the mines at Ruth to the reducing works at McGill. The transportation of other traffic was to be performed by the carrier as before. The carrier transferred to the copper company the equipment to be used in the ore transportation. * * *". (138 I.C.C. at 42, 43.)

Even as late as January 27, 1933, the Interstate Commerce Commission again affirmed the position previously taken by it upon this subject.

"* * * On May 28, 1920, the respondent and the copper company entered into an agreement, effective the following September 1, whereby the copper company took over the interindustry service of transporting the ore from its mine to its reducing plant. Other transportation was to be performed by the respondent as before. * * * On brief counsel for our bureaus point out that the apparent effect of this 1920 agreement was to reduce materially the respondent's net railway operating income in subsequent years, and consequently the amounts payable under section 15a of the act, and urge that an accounting should be had for every year that this agreement has been in force with a view to determining what the net railway operating income would have been during each of the respective years had it not been in force.

"This agreement was considered by us in Guaranty Settlement with Nevada N. Ry., 138 I.C.C. 40. We there held that without doubt its purpose was to reduce the net railway operating income of the respondent, thus avoiding in a measure the effect of the recapture provisions of section 15a of the act, but that the transportation of the copper company's ore from the mine to the mill should be regarded as a plant service and not as 'general transportation'. This transportation of ore which the copper company has chosen to perform itself is merely a preliminary step in the process of preparing raw material for marketable use and as such is purely a plant service. The contention of the bureau is overruled. No adjust-

> ment of net railway operating income during the recapture periods will be made in respect to this item." Nevada Northern Railway Company Excess Income, Finance Docket No. 3856, 189 I.C.C. 415, at 434.

What is the present status of these trackage licenses? Are they valid, or are they void? Must these carriers be dissolved to permit the mining companies themselves to haul their ores from mine to mills?

## CONCLUSION

It is therefore respectfully submitted that this petition for a writ of certiorari should be granted.

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